DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

ARMOUR & CO. *v.* COMMONWEALTH.

Sept. 9, 1913.

[79 S. E. 328.]

Licenses (§ 40*)—Criminal Prosecutions—Doing Business as Merchant without License.—The conviction of defendants for doing business without a license was proper, where defendants were, contrary to law, doing business as merchants without a license, though defendants contended that the commissioner of revenue proceeded on a wrong basis in estimating the amount of their sales, for the purpose of determining the amount to be paid for a license.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 79-83; Dec. Dig. § 40.* 9 Va.-W. Va. Enc. Dig. 323; 14 Va.-W. Va. Enc. Dig. 652; 15 Va.-W. Va. Enc. Dig. 609.]

Error to Corporation Court of Danville.

Armour & Co. were convicted and fined for doing business in the city of Danville as merchants without a license, and they petition for writ of error. Affirmed.

Hall & Woods, of Roanoke, for petitions.
The Attorney General, for the Commonwealth.

NESBIT *v.* WEBB.

Sept. 11, 1913.

[79 S. E. 330.]

1. Negligence (§ 32*)—Injuries to Third Person—Dangerous Premises—Use of Premises—Invitee.—Defendant, having contracted to construct a new roundhouse for a railroad company on the site of an existing roundhouse, the work to be done in sections so as not to necessitate a discontinuance of the use of the house, excavated a foundation ditch across a pathway habitually used by the railroad company's employees. Plaintiff, a locomotive engineer, returning early in the morning from his run, put his engine away and started on his usual route along the pathway and traveled until he suddenly fell into the ditch and received injuries for which he sued. He did

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*For other cases the same topic and section NUMBER in Dec. Dig. & Am. Dig. Ke. No. Series & Rep'r Indexes.

not know that the ditch had been dug and encountered no obstruction along the route prior to his fall. Held, that plaintiff was using the premises while in the discharge of his duties as an employee of the railroad company and not for his own convenience, and that the court properly refused to charge that if the railroad company had turned over the possession of the premises to defendant for the purpose of rebuilding the roundhouse, and plaintiff was not required to go on the premises for any purpose in the performance of his duties as an engineer of the railroad company, and he went thereon for his own convenience, he had no legal right on the premises and defendant owed him no duty to keep the premises in a safe condition, but that plaintiff assumed the risk arising from the condition of the premises by reason of the work going on there.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.* 10 Va.-W. Va. Enc. Dig. 367; 14 Va.-W. Va. Enc. Dig. 476.]

2. Trial (§ 252*)—Abstract Instructions.—Where a locomotive engineer, while leaving the railroad premises, fell into a ditch excavated by a contractor and was injured, an instruction that, if the jury believed that plaintiff had no legal right on the premises, then the only duty that the defendant contractor owed him was not willfully to injure him while on the premises was abstract and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 720; 14 Va.-W. Va. Enc. Dig. 564; 15 Va.-W. Va. Enc. Dig. 515.]

3. Trial (§ 260*)—Instructions—Request to Charge—Instructions Given.—It is not error to refuse one of defendant's requests to charge where the jury was liberally instructed on every phase of defendant's theory of the case.

[Ed. Note.—For other cases, see Trial Cent. Dig. §§ 651-659; Dec. Dig. § 260.* 1 Va.-W. Va. Enc. Dig. 604; 15 Va.-W. Va. Enc. Dig. 71.]

4. Railroads (§ 358*)—Persons on Track—Care Required.—While a railroad company is entitled to a clear track and is not ordinarily liable for injuries to persons on its track, yet if it knows, or by the exercise of ordinary care could know, that persons are in the habit of or have been for some time using its track for a footpath, so that it has no right to expect a clear track, then it is its duty to exercise reasonable care to prevent injury to persons so on the track at such place.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.* 11 Va.-W. Va. Enc. Dig. 570; 14 Va.-W. Va. Enc. Dig. 465; 15 Va.-W. Va. Enc. Dig. 845.]

5. Appeal and Error (§ 1002*)—Verdict—Conflicting Evidence.—Where an action for injuries was properly submitted to the jury on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

conflicting evidence, a verdict in favor of plaintiff would not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.* 1 Va.-W. Va. Enc. Dig. 620; 14 Va.-W. Va. Enc. Dig. 101; 15 Va.-W. Va. Enc. Dig. 73.]

Error to Corporation Court of Roanoke.

Action by J. E. Webb against J. C. Nesbit. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wood, of Roanoke, for plaintiff in error.
Jackson & Henson, of Roanoke, for defendant in error.

MARSTELLER *v.* WARDEN et al.

Sept. 11, 1913.

[79 S. E. 332.]

Evidence (§ 417*)—Parol Evidence—Written Contract—Omissions.—Plaintiffs offered to furnish stone and erect a parish house for a specified price and to supply the stone and complete an unfinished tower on a church building according to specifications and drawing, "walls to be one foot six inches thick," for a specified further sum. The offer was accepted and a written contract executed which did not specify the thickness of the walls of the tower but provided that they should "correspond with the walls of the church." The original pencil sketch of the tower work, on which the bid was predicated, having been mislaid, plaintiffs called for plans and specifications, and these, being furnished, called for tower walls 26 inches thick. Held, that the provision that the walls of the tower should conform to the walls of the church should be construed as referring to quality, finish, and appearance of the material only, and that the contract was incomplete as to the thickness of the walls, so that parol evidence was admissible to show the actual agreement of the parties on that question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.* 10 Va.-W. Va. Enc. Dig. 704; 14 Va.-W. Va. Enc. Dig. 804; 15 Va.-W. Va. Enc. Dig. 769.]

Error to Law and Chancery Court of City of Roanoke.

Action by J. K. Warden and another against J. H. Marsteller. Judgment for plaintiffs, and defendant brings error. Affirmed.

A. E. King and *Poindexter & Hopwood,* all of Roanoke, for plaintiff in error.
Jackson & Henson, of Roanoke, for defendants in error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.